Supreme Court, U.S.
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No. 86-1656

In The

Supreme Court of the United States

October Term, 1986

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UTAH POWER & LIGHT COMPANY,

Appellant,

v.

IDAHO PUBLIC UTILITIES COMMISSION, UNITED STATES DEPARTMENT OF ENERGY, and IDAHO POWER COMPANY,

Appellees.

—o—

On Appeal from the Supreme Court of Idaho

—o—

MOTION TO DISMISS OF APPELLEE IDAHO PUBLIC UTILITIES COMMISSION

—o—

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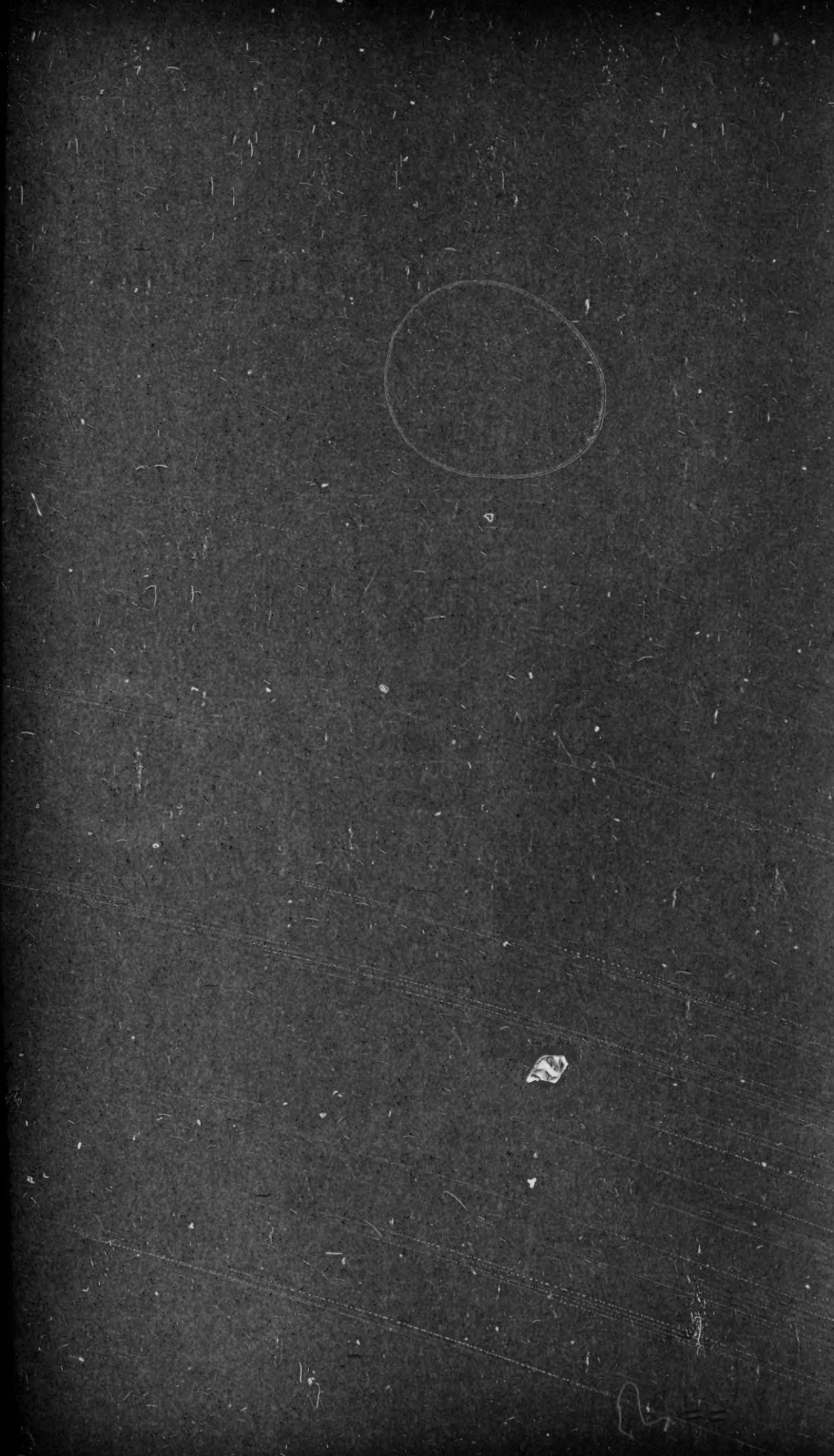

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MOTION TO DISMISS

Appellee Idaho Public Utilities Commission hereby moves to dismiss the appeal of Utah Power & Light Company in No. 86-1656. Appellant challenges orders of the Idaho Public Utilities Commission affirmed on appeal by the Supreme Court of Idaho in *Utah Power & Light Company v. Idaho Public Utilities Commission*, — Idaho —, 730 P.2d 930 (1986). The Commission's orders in that case "decided that, as between two utilities with valid certificates to deliver energy at transmission voltage, the utility that is currently and satisfactorily serving the disputed area may continue to do so." — Idaho at —, 730 P.2d at 935. Appellant contends the orders were state "statutes" that deprived it of its property without just compensation and without notice and due process, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Appellee contends the Court has no jurisdiction to hear the appeal because the orders of the state commission were not state "statutes" under the Court's jurisdictional statutes.

The Jurisdictional Statute. 28 U.S.C. § 1257(2) provides for direct appeal where the question of "the validity of a statute of any state" is challenged under the Constitution of the United States, and the highest state court reviewing the statute upholds it. The appellant's brief at pages 2-3 states the following reasons for the Court's jurisdiction in No. 86-1656:

> The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). State public utilities commission orders issued under delegated authority are "state statutes" for purposes of 28 U.S.C. § 1257(2). *E.g.*,

Atchison, Topeka & Santa Fe Railroad Co. v. Public Utility Commission, 346 U.S. [346] (1953); *Lake Erie & Western Railroad Co. v. Public Utilities Commission*, 249 U.S. 422, 424 (1919); *William v. Bruffy*, 96 U.S. 176, 183 (1878) (under predecessor statute).

Accordingly, the Court's jurisdiction on direct appeal can be invoked in No. 86-1656 only if the orders of the Idaho Public Utility Commission reviewed by the state court are "statutes" within the meaning of 28 U.S.C. § 1257(2). But, appellee contends that those orders are not "statutes" under 28 U.S.C. § 1257(2), and the appeal should be dismissed.

Some Regulatory Commission Orders Are "Judgments", Not "Statutes", For Jurisdictional Purposes. The Court's precedents hold that *some* orders of state public utilities commissions are "statutes" within the meaning of 28 U.S.C. § 1257(2), but the Court's precedents also establish the analytical framework showing that not all such orders are "statutes" for purposes of determining the Court's appellate jurisdiction. The Court's own analyses show that orders of the kind issued in this case by the appellee Idaho Public Utilities Commission and affirmed on appeal by the Supreme Court of Idaho are not state "statutes" within the meaning of this Court's jurisdictional statutes.

There is a distinction between regulatory commission orders in the nature of "judgments" (judicial in nature) and those in the nature of "statutes" (legislative in nature). *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), sets forth the test by which orders of a public utilities commission are classified for analysis under the Court's jurisdictional statutes. In *Prentis* the Court as-

sumed that for some purposes a state regulatory commission was a court, but explained why for others it was a legislative body:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed to already exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind.

211 U.S. at 226. The nature of a proceeding "depends not upon the character of the body but upon the character of the proceeding." *Ibid.*

The judicial-legislative dichotomy of *Prentis* is still applied in the Court's analysis of its own jurisdiction to review lower court decisions. *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 476-477 (1983). Proceedings before a state tribunal that are adversary in nature and in which a declaration of rights under existing law is sought and given are judicial, not legislative. *Id.* at 478-480.

In this proceeding the appellee United States Department of Energy sought a declaration that the appellee Idaho Power Company had a right to serve it exclusively. The appellant Utah Power contended that its previously existing certificate gave Utah Power the exclusive right to serve. The appellee Idaho Power contended that its previously existing certificate gave it the right to serve. The appellee Commission's findings agreed with the latter utility's position.

Conceding for the sake of argument that the orders of the Idaho Public Utilities Commission issuing the previously existing certificates were "legislative" acts that would be state "statutes" within the meaning of 28 U.S.C. § 1257(2); nevertheless, the Commission's declaratory orders determining whether the appellee United States Department of Energy had a right to take its electric service solely from the appellee Idaho Power Company and not from the appellant Utah Power & Light Company according to the terms of previously issued certificates of the two utilities was a judicial inquiry, not a state "statute" within the meaning of 28 U.S.C. § 1257(2). The *Prentis* rule, reaffirmed in *Feldman*, shows that this declaration of rights under previously existing certificates was in the nature of a "judgment" in a case or controversy, not in the nature of a "statute", and the Court has no jurisdiction under 28 U.S.C. § 1257(2) to hear a direct appeal from the Supreme Court of Idaho's affirmance of the declaratory orders of the Idaho Public Utilities Commission because those orders were not "statutes".

Appellant's Cases Do Not Support Jurisdiction Over This Appeal. The cases cited by the appellant for the proposition that some orders of state public utilities commissions are state "statutes" under 28 U.S.C. § 1257(2) are inapposite.

In *Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission*, 346 U.S. 346 (1953), the Court reviewed several orders of the California Public Utilities Commission. Pursuant to the Public Utilities Code of California, the California Commission issued orders directing the upgrade or improvement of certain grades, crossings, separations, etc.; the Orders further allocated the

costs among railroads and other entities. For jurisdictional purposes, the Court considered these orders like statutes enacted by the legislature directing that future improvements be made and apportioning these costs in the interest of public safety, convenience and necessity. 346 U.S. at 348.

Each order of the California Commission was a directive to undertake certain future conduct (improvements near railroad property and payment of costs), not an adjudication of liabilities, rights or responsibilities under past law, because no person had a "right" to any particular kind of improvement or a "liability" for any particular cost under previously existing law. Instead, the orders themselves made legislative-like decisions to order the improvements thought necessary and to prescribe the terms for apportioning costs. *Ibid.*, n.2. Those orders were therefore state "statutes". The precedent is inapposite to the orders under review in this case, which adjudicated rights under previously existing certificates.

In *Lake Erie & Western Railroad Co. v. Public Utilities Commission*, 249 U.S. 422 (1919), the Illinois Public Utilities Commission ordered Lake Erie & Western Railroad Company to restore track that had been removed from an area where a grain elevator and coal yard had been destroyed by fire. Again, the order was a directive for future action, not an adjudication of rights under former law. It is properly considered legislative in nature under *Prentis* and is not precedent applying to the facts in this case.

Finally, in *Williams v. Bruffy*, 96 U.S. 176 (1878), the Court did not consider an order of a public utilities commission, but the status to be accorded an enactment of the

Confederate States of America during the Civil War *vis-a-vis* Virginia statutes, i.e., whether the Commonwealth of Virginia had itself assented to the Confederate enactment in a manner for it to be considered a state "statute" under the predecessor to 28 U.S.C. § 1257(2). The "statute" in question sequestered the property and contract rights of citizens of the United States and was thus a rule for future conduct. Therefore, it was also legislative under the *Prentis* test.

The cases cited by the appellant in favor of jurisdiction under 28 U.S.C. § 1257(2) involved delegation of legislative authority that "look[ed] to the future and change[d] existing conditions by making of a new rule to be applied thereafter . . . ." Such new rules are properly considered "statutes" under 28 U.S.C. § 1257(2).

By contrast, the orders of the Idaho Public Utilities Commission in this proceeding were in the nature of a judicial inquiry because they "investigate[d], declare[d] and enforce[d] liabilities as they st[ood] on present or past facts and under laws supposed to already exist." Appellee reviewed two utilities' existing certificates and declared rights under them. It did not create new certificates. Accordingly, the orders of the Idaho Public Utilities Commission that appellant seeks to review are not state "statutes" within the meaning of 28 U.S.C. § 1257(2), and the Court has no jurisdiction to hear a direct appeal from the Supreme Court of Idaho's judgment affirming those orders.

Therefore, the appellee Idaho Public Utilities Commission moves the Court to dismiss No. 86-1656 for lack of jurisdiction under 28 U.S.C. § 1257(2).

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OPPOSITION TO GRANT OF CERTIORARI

Treating the appellant's notice of appeal as a petition for a writ of certiorari, 28 U.S.C. § 2103, in which case the Court has jurisdiction to review the judgment of the Supreme Court of Idaho under 28 U.S.C. § 1257(3), regardless of the classification of the orders as judicial or legislative in nature, the writ of certiorari should not be issued because:

(1) There are no conflicting state or federal court decisions on the narrow question of interpretation of the certificates of public convenience and necessity of Utah Power & Light Company and Idaho Power Company for Butte County, Idaho; and

(2) There is no national interest in resolution of this narrow question of the law of these two utilities' certificates for Butte County, Idaho.

DATED this 8th day of May, 1987.

Respectfully submitted,

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